

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

UNIONTOWN FIRE DEPARTMENT, INC.

Employer

and

Case No. 8-RC-16786

TEAMSTERS LOCAL NO. 348 A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.¹

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time paramedic firefighters employed by the Employer at its 13055 Oakwood Avenue, Uniontown, Ohio facility, excluding all part-time paramedic firefighters, part-time emergency medical technicians, part-time medics, and part-time firefighters, the chief, assistant chiefs, captains and lieutenants, and all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Approximately five full-time paramedic firefighters are in the unit found to be appropriate.²

¹The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of these employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. The Employer and the Union filed post-hearing briefs which I have considered.

² The parties stipulated that full-time paramedic firefighters average at least 48 hours a week. In addition, the record reveals that there are approximately 33 part-time or on-call paramedic firefighters who work sporadically and are excluded from the unit.

I. THE ISSUES

A. Whether the Employer meets the Board's jurisdictional commerce standards under the Act.

B. Whether the petition should be dismissed because the employees sought to be included in the bargaining unit are managerial employees.

C. Whether lieutenants and captains should be excluded from the proposed bargaining unit because they are supervisors within the meaning of Section 2(11) of the Act.

II. DECISION SUMMARY

I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction here. I also find that the employees sought to be included in the bargaining unit are not managerial employees and accordingly, I will direct an election in this matter. Finally, I find that employees in the positions of lieutenants and captains are supervisors within the meaning of Section 2(11) of the Act and are excluded from the bargaining unit.

III. POSITIONS OF THE PARTIES

Initially, the Employer argues that the petition should be dismissed because the Employer does not satisfy the Board's jurisdictional standards and that asserting jurisdiction would not effectuate the policies of the Act. Secondly, the Employer argues that the petition should be dismissed because all the employees sought in the petition are managerial employees and should be excluded. Finally, the Employer contends that lieutenants and captains are supervisors within the meaning of Section 2(11) of the Act and should be excluded.³

The Union argues that the evidence presented demonstrated that the Employer meets the Board's jurisdictional standards and that it would effectuate the purposes of the Act to assert jurisdiction, that the petitioned-for employees are not managerial employees and that employees in the classifications of captains and lieutenants are not supervisors within the meaning of the Act and should be included in the bargaining unit.

IV. FACTS

The Employer is a private fire department which provides fire and emergency medical services, as well as prevention and educational services on a contract basis to Lake Township, Ohio. In about 1999, a board of directors was created by the members of the fire department.

³ At the time of the hearing, there were three captains and two lieutenants. Captains Jason Walker, Brett Bell and Dan Block were all part-time employees. Lieutenant Steve Shaffer was also a part-time employee. The other lieutenant, Denise Hostetler, was the sole full-time employee within the disputed classifications of captain and lieutenant. While the Union's brief is limited to a discussion of Hostetler's status, at the hearing the Union argued that full-time captains and lieutenants should be included.

Under the current constitution and bylaws, board members are elected by a vote of the operating members of the department. Employees are considered operating members after they have been employed over one year. Operating members include both full-time and part-time employees.⁴

The board of directors is composed of nine members. Board members serve for three years and their terms are staggered. The constitution and bylaws provide that four members are selected from outside the department and four are selected from the operating members. Pursuant to the constitution and bylaws, the ninth member can either be an outside or inside member. Since the board's creation, the ninth member has traditionally been an inside member. While board members generally receive \$25 each month for their services, the board president, treasurer, secretary and vice president additionally receive \$100, \$75, \$50 and \$25 per month, respectively.

When the petition was filed January 9, 2006 and at the time of the hearing, there were two vacancies on the board of directors as a result of the resignations of former board members Jeffrey McDonough and Jeff Morgan, both full-time paramedic firefighters. At the time of the hearing, the seven members of the board of directors included four outside members and three inside members, part-time employees Ryan Casper, John Kleinbeck, and Don Shaffer.

The president of the board of directors chairs the monthly meetings, sets the agenda and appoints board members to various committees such as the nominating committee, the budget committee, and the chief review committee. The testimony further revealed that the board president, as a part of a multi-party process including the chief, the treasurer, and the accountant, signs checks on behalf of the Employer.

With respect to board members in general, the evidence revealed that the constitution and bylaws does not prohibit inside board members from voting on matters involving terms and conditions of their own employment. Under the current constitution, any operating member may submit a proposal to change the bylaws or amend the constitution. Once a proposal or amendment is submitted, the board of directors is required to vote on the matter by the next meeting. The change would then have to be approved by a two-thirds vote of the board. Thereafter, a simple majority of the operating members is needed to ratify the change approved by the board.

The officers of the department include Fire Chief Thomas Wiles, Assistant Chiefs Derrick Shaffer and David Dague, Captains Jason Walker, Brett Bell and Dan Block, and Lieutenants Steve Shaffer and Denise Hostetler. Amongst these eight officers, only Lieutenant Hostetler is a full-time employee. According to the constitution and bylaws, the fire chief determines the number of officers required for the operation of the department.

The fire chief manages the operations of the department, oversees the department's employees, and establishes certain employee policies. With board approval, the chief is responsible for hiring, firing, and suspending employees.⁵ The chief is also responsible for

⁴ Positions for full-time employees became available in the last three years. Currently, the fire department employs six full-time employees and approximately 33 part-time or on-call employees.

⁵ Employees disciplined have the ability to grieve the disciplinary action to the board of directors.

scheduling employees, although in the past he has delegated this function to Lieutenant Hostetler and most recently to an assistant chief. The chief is appointed by, serves at the pleasure of, and reports to the board of directors.

V. THE EMPLOYER SATISFIES THE BOARD'S JURISDICTIONAL STANDARDS

At the hearing, the President of the Employer's Board of Directors, Jeffrey Heimbaugh, testified that in the past year the Employer received approximately \$727,000 in revenues from Lake Township. In addition, Heimbaugh testified that the Employer purchased a fire truck costing approximately \$326,000 in the spring of 2005.⁶ In response to the hearing officer's question as to whether the Employer purchased other goods from across state lines, Heimbaugh testified that maybe medical supplies were purchased by the Employer in an amount under five thousand dollars. Heimbaugh testified that the Employer's annual expenditures for property and casualty insurance on its vehicles was approximately \$20,000.⁷

Fire Chief Thomas Wiles testified that the Employer also purchased flashlights from across state lines. According to Wiles, the Employer spent approximately \$1,000 for flashlights.⁸

Union witness Jeff McDonough testified that he was familiar with Employer finances as a result of his former position as president of the board of directors. McDonough provided unrebutted testimony that during the past year the Employer sold an old fire truck on E-bay for approximately \$9,000.

The testimony reveals that the Employer meets the requisite commerce standards. A non-retail enterprise will meet the Board's jurisdictional standard when its outflow or inflow, either direct or indirect, across state lines exceeds \$50,000. *Sieman's Mailing Service, 122 NLRB 81 at 85 (1959)*. As noted above, in the spring of 2005, the Employer purchased a fire truck valued in excess of \$326,000 from a Pennsylvania manufacturer.

The Employer, citing *Magic Mountain, Inc., 123 NLRB 1170 (1959)*, argues that the purchase of the fire truck was a nonrecurring expenditure that should be excluded from a calculation of gross inflow. In that case, concerning an amusement park under construction, the Board determined not to assert jurisdiction at the time because there was no information in the record as to what volume of business would be expected after the park's completion or to what extent the business would affect interstate commerce.

⁶ While Heimbaugh testified that the Employer arranged the purchase through a local (Ohio) dealer, Warren Fire, he acknowledged that the check was made out to, and Employer representatives picked up the fire truck from, KME, the Pennsylvania manufacturer of the fire truck.

⁷ While the Employer's insurance agent is located in Uniontown, Ohio, the insurance carrier is based in New York.

⁸ According to Wiles, while the invoice came from North Carolina, the manufacturer was a Washington state company. Wiles also testified that the Employer's natural gas provider was Dominion, and he estimated the annual cost to be \$4,000. While Wiles was unsure of Dominion's location, the Employer's initial witness, Lake Township's fiscal officer Sommers, testified that Dominion was located in Richmond, Virginia.

Assuming the fire truck was a nonrecurring expenditure, the Board has long held that under the Board's non-retail inflow test, purchases are included when they are not the sole items of inflow. Arrow Rock Materials, 284 NLRB 1 (1987); East Side Sanitation Services, Inc., 230 NLRB 632 (1977); and Snowshoe Company, 212 NLRB 353 (1974). The record reveals that the fire truck purchase does not constitute the only item of inflow. Accordingly, since the cost of the fire truck, along with the above-noted direct inflow, exceeds \$50,000, I conclude that the Employer has met the requisite commerce standards and it is appropriate to assert jurisdiction.⁹

VI. EMPLOYEES IN THE PETITIONED-FOR UNIT ARE NOT EXCLUDABLE AS MANAGERIAL EMPLOYEES

Although the Act contains no specific exclusion for managerial employees, under Board policy, managerial employees have been excluded from the Act's protection. NLRB v. Yeshiva University, 444 U.S. 672 (1980); Bell Aerospace, 219 NLRB 384 (1975), *on remand from the Supreme Court's decision in 416 U.S. 267 (1974)*. Employees are excluded as managerial employees if they "...formulate and effectuate management policies by expressing and making operative the decisions of their employer..." and "...have discretion in the performance in their jobs independent of their employer's established policies." Tops Club, Inc., 238 NLRB 928, *fn. 2* (1978), *quoting Bell Aerospace*, above.

In support of its argument that the petition should be dismissed because the petitioned-for employees are managerial and therefore excluded, the Employer relies upon Florence Volunteer Fire Department, Inc., 265 NLRB 955 (1982). In Florence, an executive committee comprised of two paid firefighters and four volunteers, chaired by an elected vice president had managerial responsibility over the budget, scheduling, wages and other employee benefits. Moreover, all matters voted on by the executive committee were submitted to the overall membership, both paid and unpaid members, for approval. The petitioner in Florence, argued that the petitioned-for unit of paid firefighters should not be found to be managerial for the following reasons: 1) the evidence revealed that paid members on the executive committee abstained from voting on wages and benefits; 2) the bylaws could be amended to preclude a conflict and 3) paid members constituted one-third of the executive committee and one-fourth of total membership. Florence, *above at 956*. The Board, contrary to the petitioner, found the paid firefighters in Florence to be managerial employees. In reaching this conclusion, the Board, citing Sida of Hawaii, Inc., 191 NLRB 194 (1971), noted it had excluded employee shareholders who collectively constituted a majority and could impact managerial policy by their ability to determine the selection and retention of board members. Also, the Board in Florence, citing Brookings Plywood Corporation, 98 NLRB 794, 798 (1952), noted it had similarly excluded employee shareholders

⁹ In addition, the Employer's initial witness Lake Township fiscal officer Ben Sommers testified that the township's annual revenues exceeded \$7,000,000. He further testified that it was the township's policy to use local vendors. Sommers, however, acknowledges that the vendors may include companies with out-of-state headquarters and concedes checks may go out of state. Sommers testified that the township paid Anthem Blue Cross \$321,584 last year for health and dental insurance. In addition, Sommers testified that the township paid approximately \$180,000 for two snow trucks with plows manufactured by International Trucks. Finally, Sommers testified that the township paid approximately \$11,000 to Dominion in Richmond, Virginia for natural gas and approximately \$7,000 to SBC in Saginaw, Michigan for telephone services. While the township admittedly is an exempt entity, its receipts exceed the retail standard and its undisputed out-of-state payments relative to natural gas and telephone services were significant.

who comprised a minority when the “possibility of their influence on management policy was not remote.” Florence, above at 956. The Board, in Florence, rejected the petitioner’s arguments, noting paid and unpaid members shared an equal voice in management decisions because “no policy is set or implemented by the Employer without the ratification vote of the membership at large.” Florence, above at 956-957.

The facts in the instant case are distinguishable. Unlike the monthly membership meetings in Florence, operating members of the Uniontown Fire Department meet annually. Decisions of Uniontown’s board of directors, unlike those of the executive committee in Florence, are not submitted to the full membership for ratification. Rather, the sole issue posed to membership at the annual meeting is the election to fill vacancies on the board of directors. Unlike in Florence, major decisions such as the budget, scheduling, wages and other employee benefits are not voted on by the entire membership. Rather, decisions with respect to the budget, purchases, hiring, firing, wages and other benefits are made by the fire chief and/or the board of directors, none of whom are in the unit found appropriate.¹⁰

The Employer argues that Uniontown’s full-time firefighters are analogous to the stockholder employees excluded from the bargaining unit in Sida, supra, Brookings, supra and Cab Services, Inc. d/b/a Red and White Airway Cab Co., 123 NLRB 83 (1959). In each of these cases the Board found that shareholder employees were afforded certain preferential treatment and their inclusion would have an adverse impact on nonshareholder employees. The preference noted in the cases cited by the Employer included shareholder rebates, bumping rights and shift preference. In Brookings supra., stockholders were paid more than nonstockholders and could under certain circumstances have the right to call stockholder meetings.

In the instant case, there was no evidence of such types of preferential treatment. In addition, both full-time and part-time operating members were equally entitled to participate in the annual election to fill openings in the board of trustees. Infact, the number of part-time operating members dramatically exceeded that of full-time operating members. Further, while the wage rate of full-time firefighters had increased considerably in the past two years, at the time of the hearing, the wage rate for full-time members was significantly under the wage rate of part-time members.

Although I note that full-time employees unlike part-time employees receive paid medical insurance, personal days and a uniform allowance, this difference may be attributable to the fact that numerous of the part-time and on-call employees are employed elsewhere in a full-time capacity.

Finally, while the Employer argues that until recently full-time firefighters represented at least 40% of the inside employee members on the board of directors, at the present time there are no full-time firefighters on the board.

¹⁰ As previously noted, full-time paramedic firefighters McDonough and Morgan previously held positions on the board of directors but resigned prior to the filing of the petition. At the time of the hearing, none of the employees in the petitioned-for unit were members of the board. With respect to petitioned-for employees who may subsequently serve on the board of directors, I conclude these employees may properly be excluded as managerial employees.

In **The Upper Great Lakes Pilots, Inc., 311 NLRB 131, 132 (1993)** the Board reiterated its well settled proposition that “stock ownership alone does not deprive an employee from the protection of the Act”. In the instant case, the petitioned for employees are not shareholders and their single annual vote to select a staggered minority of the members of the board of directors is insufficient to strip the proposed bargaining unit of its representation rights. Accordingly, I conclude that the full-time nonsupervisory paramedic firefighters should not be excluded as managerial employees.

VII. **EMPLOYEES IN THE CLASSIFICATIONS OF CAPTAINS AND LIEUTENANTS ARE SUPERVISORY EMPLOYEES WITHIN THE MEANING OF SECTION 2(11) OF THE ACT.**

Section 2(11) of the Act defines the term “supervisor” as “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”. Section 2(11) is to be read in the disjunctive and accordingly, the possession of one of the above articulated authorities is sufficient to confer supervisory status. **American Commercial Barge Line Co., 337 NLRB 1070 (2002)** **Harborside Healthcare Inc., 330 NLRB 1334 (2000)**.

The burden of proving supervisory status is on the party who alleges that it exists. **NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861, 1863 (2001)**. The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), aff’d. in relevant part 794 F.2 527 (9th Cir. 1986)**.

At the scene of a fire, major automobile accidents and other medical emergencies each Uniontown officer is responsible for the direction of the department members as well as the scene itself. In order to recognize the hierarchy and authority at such a scene officers wear helmets of different colors from the nonofficer firefighters. Captains and lieutenants wear red helmets while nonofficers wear yellow helmets. Captains and lieutenants have individual radios, computers and offices.

According to the testimony of the fire chief, officers are considered management and attend officers meeting. Officers are further distinguished outside an emergency scene by the badge they wear. While officers wear gold badges, nonofficers wear silver badges. The process of becoming an officer is a competitive process with an examination, an interview by the fire chief, an examination of the applicants’ records and finally the chief submits his promotion recommendation to the board of directors for approval. According to the fire chief, some officers have had special training. In addition, officers receive a premium pay rate with lieutenants and captains respectively receiving an additional five and ten percent above the rate paid to nonofficer firefighters.

The employee handbook describe officers' responsibilities, amongst others as commanding an engine or truck company and a fire rescue station, conducting and supervising training for station personnel and reporting violations of department rules, regulators and/or policies. In the handbook's disciplinary action provisions, officers witnessing an act unbecoming a department member may immediately verbally counsel the member. According to the handbook, disciplinary action beyond verbal counseling is documented on a Notice of Disciplinary Action. Officers complete brief written summaries in the case of a verbal reprimand and a complete written account of the facts surrounding an incident which results in a written reprimand. Both verbal reprimands and written reprimands are forwarded to the fire chief who either accepts or rejects that discipline is warranted.

Fire Chief Wiles testified that he does not personally investigate every write-up, rather he delegates. While the fire chief acknowledges that neither Lieutenant Hostetler nor any other lieutenant has suspended an employee, he recalls that with respect to the last two suspensions he was involved with he included Lieutenant Shaffer and Captain Walker in the meetings to discuss the appropriate action.

Fire Chief Wiles further testified that captains and lieutenants have issued verbal and written discipline that remains in an employee's personnel file. Lieutenant Hostetler testified that she exercises independent judgment when deciding whether an infraction warrants written documentation. In addition, Hostetler testified that she was responsible for scheduling employees for a period of 1½ to 2 years and acknowledges that she is unaware of anyone other than an officer scheduling employees. The fire chief also testified that captains and lieutenants have the authority and have made hiring and firing recommendations. Specifically, he testified that an applicant currently going through the hiring process was recommended by Lieutenant Shaffer. In addition, the fire chief specifically recalls Captain Walker conducting a hiring interview and notes other officers have done so. According to the chief, after conducting an interview, Captain Walker advised him that an applicant should be rejected and the chief testified that he was guided by Walker's recommendation.

In summary, the testimony and the exhibits reveal that captains and lieutenants possess the indicia of supervisory authority as defined in the Act and I find them ineligible to vote in the election directed herein.

In addition, the parties have stipulated that the following named individuals occupy the positions set forth opposite their respective names and agree that these individuals are supervisors within the meaning of the Act.

Thomas Wiles
Derrick Shaffer
David Dague

Fire Chief
Assistant Fire Chief
Assistant Fire Chief

Based upon the parties' representation, agreement and the record, I find that the above specified individuals are ineligible to vote.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Teamsters Local No. 348 a/w International Brotherhood of Teamsters**.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by March 3, 2006.

Dated at Cleveland, Ohio this 17th day of February, 2006.

/s/ [Frederick J. Calatrel]o

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

